United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1649

To be argued by
WARREN A. SCHNEIDER

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1649

EXXON CORPORATION, successor by merger to
ESSO INTERNATIONAL, INC.,
Plaintiff-Appellee,

—against—

A. L. BURBANK & COMPANY, LTD.,
Defendant-Appellant,

—and—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA

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Introductory Statement

This action was brought by Exxon Corporation against co-defendants A. L. Burbank & Co., Limited, the appellant herein, and the United States of America, the appellee. The initial basis for the action by plaintiff against the United States was based on Burbank's assertion that at the time of ordering the bunkers herein it was acting as an agent on behalf of the United States. If that were true, pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. § 745, Esso believed it was essential to bring the action directly against the Government. As stated in appellant's brief, there is no dispute that the bill for the bunker fuel oil is due and payable to plaintiff. On appeal,

Burbank has dropped its argument, raised at trial, that it was acting as an agent for the United States, and concedes that it is directly liable to plaintiff for the amount of the bunker charge, plus interest. It further argues that the United States must indemnify it for this payment, a position which the Government strongly disputes.

Issues Presented

1. Whether this Court should reverse the District Court on the basis of a breach of contract argument presented for the first time on appeal.

2. Whether the District Court was correct in rejecting appellant's equitable argument.

3. Whether the District Court was correct in relying on the *Fitzgerald* case.

Statement of Facts

The facts as set forth in appellant's brief are concurred in by the United States, without any acknowledgment that the portions of the contracts MA-3927 and MA-3928 (A. 11a-13a, A. 19a-22a), that appellant has unilaterally emphasized have the importance that it is now suddenly attempting to give them. These contracts covered advances of funds to pay principal and interest, as set forth in the appellant's statement of facts (pp. 3-4) and the emphasis placed thereon by appellant may be found on pages 4, 5, 7 and 9 of appellant's brief. The Government further submits that certain omitted materials should be included within any factual summary. Thus, appellant has omitted from its citation to Contract No. MA-3928, paragraph 4 thereof:

> "4. The Company hereby authorizes, directs, and empowers, Irving and Maritime respectively to apply

> any and all charter hire and other monies received under the Assignment to payment or pre-payment of the Irving Advance and to payment or pre-payment of the Maritime Advance respectively (A. 22a).[1]

As appellant has noted in his statement of facts, under the Cash Collateral Account procedures, Burbank was to submit to Irving statements of ATLAS' operating expenses and, after approval by Maritime, funds would be transferred from the Cash Collateral Account to the Special Account from which Burbank would make payments. As Mr. Caramella stated in his testimony:

> "And then we, as operating agents, to receive funds for the operation expenses of the vessel, we had to make an application to Irving Trust Company, requesting the release of funds to meet—from the collateral account to the special account, to meet the operating expenses of the vessel" (A. 37a).

Mr. Yowell testified (A. 47a) that, when the Government received invoices requesting expenditures for operating matters, the transfer was approved. Three invoices were received (A. 48a). The last one of these three was included in Burbank's letter of December 3, 1965, prior to the deposits of December 20, 1965 and December 29, 1965 of funds into the Cash Collateral Account. No requests for transfer of funds to pay operating expenses were received subsequent to December 3, 1965.

Appellant's brief includes a considerable number of references to testimony indicating that Burbank and Maritime Administration worked closely together in the operation of the ATLAS. An explanation of the factual background

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[1] As noted in appellant's brief, numerals preceded by "A" refer to pages of the Joint Appendix, numerals preceded by "T" refer to pages of the transcript of the trial and letters or numerals preceded by "E" refer to exhibits put into evidence at trial.

requiring such contact is found in Mr. Yowell's direct testimony (R. 44a-45a). As noted therein, it became apparent to the Government in December 1965 that the operation of the ATLAS had not produced the financial results forecast to the Maritime Administration by Burbank. As Mr. Caramella himself admitted on direct examination, the forecasts of cash flow made by Burbank, which were made to demonstrate to Maritime how the ATLAS could be operated to earn sufficient funds to pay the principal and interest on the loans, were "from hindsight, not too good" (A. 39a). It is this background which justified the Maritime Administration's arrest and subsequent sale by the U. S. Marshal of the ATLAS.

ARGUMENT

POINT I

There is no basis for this Court to reverse the District Court decision on the basis of any breach of contract argument.

As noted previously, Burbank, in the District Court, brought a cross-claim against co-defendant United States on the basic argument that it was acting as an agent for the Government when it ordered the bunker fuel involved herein. This argument was decided adversely to Burbank by the Court below. No appeal has been taken from that determination. As a secondary argument, Burbank claimed that it was inequitable for the United States to pay itself the funds on deposit in the Cash Collateral Account, when there were operating expenditures for which Burbank had not been reimbursed. No issue was ever raised at any time on the District Court level concerning an alleged breach of the contract arrangements set forth in Contracts MA-3927 and 3928, despite the fact that this action has been in litigation since April 1967. During that period, a deci-

sion on a joint motion for summary judgment brought by plaintiff and the United States was denied by Judge Cooper, and the case was subsequently tried. For a recapitulation of the issues raised below, the Court's attention is respectfully called to pages 94 to 98 of the trial transcript.

There are numerous cases in this Circuit holding that an issue may not be raised on appeal if it has not been presented to the District Court. See, for example, *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962 (2d Cir. 1972), *cert. den.*, 409 U.S. 1038 (1972); *First National Bank of Cincinnati* v. *Pepper*, 454 F.2d 626 (2d Cir. 1972); *Schwartz* v. *SS Nassau*, 345 F.2d 465 (2d Cir. 1965), *cert. den.*, 382 U.S. 919 (1965); *National Equipment Rental Ltd.* v. *Stanley*, 283 F.2d 600 (2d Cir. 1960); *Patent & Licensing Corp.* v. *Olsen*, 188 F.2d 522 (2d Cir. 1951).

Even if this Court decides that this issue of breach of contract, which has suddenly been emphasized in the italicized portions of appellant's brief, is ripe for determination here, there is no justification for reversal of the District Court's decision. Appellant's argument basically reflects a misinterpretation of the contract provisions. A reasonable interpretation of the emphasized provisions of Contracts MA-3927 and MA-3928, when taken in context, is that the Maritime Administration, Burbank and the vessel's owner agreed that either the bank or the Government could be reimbursed from funds in the Cash Collateral Account for any unpaid amount of the principal or interest due, but would be unable to attempt to trace those funds once they had actually been paid into the Special Account. There is certainly nothing within these contracts to justify appellant's italicized interpretation, found on pages 7 and 9 of its brief, that the repayment could only be made "after payment of the Vessel's operating expenses necessarily incurred in determining those freight monies." The undue emphasis placed by appellant on the shorthand expression

in Judge Carter's Opinion (A. 52a) is an attempt to invent a new argument not presented below, and in no way established by the documents cited. The difficulty that appellant has, and which it has totally ignored, is the testimony of its own Vice President that the contractual arrangement established herein required Burbank to apply to the bank for release of any deposits. Burbank was fully aware of these deposits (A. 27a) and, for reasons unknown to appellee, decided not to bother requesting such release. Surely there is no basis for the Government to be penalized now for appellant's unilateral lack of initiative.

POINT II

There is no equitable basis for reversing the decision of the District Court.

Appellant's brief relies on one case, *First National Bank* v. *Dudley*, 231 F.2d 396 (9th Cir. 1956) to substantiate its argument that, on equitable grounds, the United States is obligated to reimburse it for the payment of the bunker charges. It is submitted that there is nothing in the facts involved in this instance that would substantiate appellant's overwhelming reliance on that one case.

The basic law, as stated by the Court in the *Dudley* opinion is a portion which has not been quoted by appellants. On page 398 of the Opinion, the Court stated:

> "It may be stated then as a general proposition that, absent circumstances rendering it inequitable so to do, a bank ordinarily may, preceding or following bankruptcy, set-off any claim, provable in character and fixed as to amount, Bankruptcy Act, § 63, sub. a, 11 U.S.C.A. § 103, sub. a, against such credit balance as the bankrupt may then have on

deposit with the bank. Continental & Commercial Trust & Savings Bank v. Chicago, 1913, 229 U.S. 435, 33 S. Ct. 829, 57 L.Ed. 1268; Studley v. Boylston National Bank, 1913, 229 U.S. 523, 33 S.Ct. 806, 57 L.Ed. 1313; New York County National Bank v. Massey, 1904, 192 U.S. 138, 24 S. Ct. 199, 48 L.Ed. 380; Ingram v. Bank of Cottage Grove, 9 Cir., 1928, 29 F.2d 86."

The Court distinguished the situation involved therein from the general rule by stating, at page 402,

". . . here it was a key provision of the extension arrangement that the bank would share, and the bank did share, equally and ratably with all other creditors."

The sharing involved therein was as a result of an express agreement between the debtor, the bank, and the other creditors whereby each of the creditors, including the bank, would accept monthly payments of 10% of their outstanding balances in compensation for their debt and in an attempt to keep the corporation functioning. Obviously, the bank's action in taking all the funds, in lieu of its 10% share, was a violation of that agreement.

It is self-evident that the agreement manifested in the contracts cited in appellant's brief does not provide for any ratable and proportionate sharing between varying creditors such as was present in *Dudley*, and, in its brief, appellee admits that it was aware of the terms of the agreement prior to the time it contracted for the delivery of bunkers in this instance.

As noted previously, the general rule, expressed in the Bankruptcy Act, 11 U.S.C. 108, is that a set-off, as provided for in the contracts herein, is generally valid. This

general rule is expressed in 4 Collier on Bankruptcy (14th Ed.) in Section 6805:

> "Thus, at any time before the filing of a [bankruptcy] petition, a bank may set-off deposits made in the ordinary course of business against matured obligations of the depositor to the bank. (Citations omitted)."

This standard rule of law has been substantiated by many cases, as noted in the cited treatise. This Circuit in *In Re Philip Semmer Glass Company,* 135 Fed. 77 (1905), appeal dismissed sub nom *Conboy* v. *First National Bank of Jersey City,* 203 U.S. 141 (1906), indicated that this was true "in the absence of fraud or collusion." Idem. There has been no argument raised by appellant that either of these is present in this case. In a later opinion, *Wolf* v. *Aero Factors Corp.,* 221 F.2d 291 (1955), this circuit affirmed a decision allowing a set-off in an instance in which a factoring corporation had made loans to the ultimate bankrupt on the security of accounts receivable. The agreement provided that the factoring corporation could apply any reserve on the accounts receivable to any indebtedness then or thereafter to become due from the bankrupt, that if any account were not paid in full the lender could charge against and deduct such amounts from any payment then due, or subsequently become due to the bankrupt, and that any money or other assets which might come into the factor's hands might be retained by it or applied to any obligation owed by the bankrupt. The facts in that case more closely reflect the situation existing here than the facts in *Dudley* do.

Appellant's argument in this case is fundamentally based on an equitable analysis, from its point of view, of the situation presented herein. Closer reflection indicates that, if anything, the equities are on the side of the United States. Appellant's vice president admits that the cash flow reports which it submitted to the Maritime Adminis-

tration were poor. It was only after additional information was obtained by the Maritime Administration that that agency determined that there was no possibility of maintaining the ATLAS as an economic entity (A. 45a). If appellant argues that the Maritime Administration should have been aware of the situation as it existed, certainly Burbank should have been at least as aware of these financial difficulties, when it arranged for purchase of bunkers under its own contract with Esso. It must be remembered that this contract provided that Burbank would be considered a principal under any circumstances (E1). If anything, this case merely reflects the fact that the Government acted as a prudent businessman in legally pursuing its rights under its loan agreement (A. 48a), and appellant is now, as an after-thought, trying to obtain legal justification for its lack of prudence. Certainly, as a minimum, it would not have been too much to require Burbank to have submitted a request for transfer of funds to the Special Account upon its being advised that additional funds had been deposited in the Cash Collateral Account in December. No such request was ever submitted, hardly indicative of the claimed reliance by Burbank on these funds.

Burbank has impliedly attempted to set up a trust arrangement whereby the funds were necessarily being held on its behalf to expend for operation of the vessel. As was stated by the lower court in the *Wolf* case, *supra,* at 126 F. Supp. 872 (S.D.N.Y. 1954), an opinion which this Circuit described as "comprehensive and excellent", (221 F.2d 291):

> "The fact that one person has collected for, and has in his possession, money belonging to another does not, without more, establish the relationship of trustee and cestui que trust. In re W. & A. Bacon Co., D.C. Mass., 261 F. 109." Idem, at 883.

There has been nothing submitted by appellant during the long course of this litigation to demonstrate any intention by any party involved herein to consider the contractual arrangements as a trust arrangement protecting Burbank in the event of its misreliance on the strength of its principal, Tankers and Tramps.

POINT III

The District Court was correct in relying on the *Fitzgerald* case.

As noted previously, the major thrust of Burbank's argument below was that, at the time of ordering the bunkers, it was acting as an agent for the United States. This argument was unavailing, as the District Court held the same issue was decided by this Circuit in *Fitzgerald* v. *A. L. Burbank,* 451 F.2d 670 (1971). Further, the Court obviously determined that there was nothing in Burbank's equitable argument which was sufficient to overcome the legal rights of the Government as mortgagee or guarantor of the mortgage as enunciated in *Fitzgerald.* See also *The Boise Penrose,* 22 F.2d 919 (2d Cir. 1927). It is submitted that the Court was correct in so doing. Since the issue as to breach of contract was never raised on the trial level, the District Court was not faced with that problem. However, if this Honorable Court decides to rule on that aspect of the appeal, it is again submitted there is nothing contained in this argument which distinguishes this case from the same basic premise set forth in *Fitzgerald.*

CONCLUSION

The judgment and decree of the District Court adjudging Burbank liable to plaintiff, Exxon Corporation, in the amount of $22,006.00 plus interest and costs, and dismissing Burbank's cross-claim against the United States and plaintiff's action against the United States, both with costs, should be affirmed.

Respectfully submitted,

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